82-954

No.

Office-Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

GEORGE V. KECKEISEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

EDWARD A. PFEFFER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

JOHN BUCHANAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E. J. CURRAN
P. O. Box 30
606 East Baltimore Pike
Media, PA 19063
(215) 565-4322
Counsel of Record for Petitioners

Of Counsel:
CURRAN, WINNING & FIORAVANTI, P. C.
P. O. Box 30
606 East Baltimore Pike
Media, PA 19063

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-6711

QUESTIONS PRESENTED

1. Whether convictions of mail fraud and a related conspiracy can be sustained on the basis of findings showing employees filed false conflict of interest statements omitting receipt of gratuities from a vendor doing business with defendants' employer.

2. Whether convictions of mail fraud and a related conspiracy must be reversed because of inconsistency with the judgment of the court below that found defendants not guilty of charges under the Elkins Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. Convictions of Mail Fraud and a Related Conspiracy Cannot Be Sustained on the Basis of Findings Showing Employees Filed False Conflict of Interest Statements Omitting the Receipt of Gratuities From a Vendor Doing Business With Their Employer	10
II. Convictions of Mail Fraud and a Related Conspiracy Are Inconsistent With the Judgment of the Court Below That Defendants Were Not Guilty of Charges Under the Elkins Act and, Therefore, Defendants' Convictions in a Non-Jury Trial Must Be Reversed	16
CONCLUSION	19
APPENDIX:	
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Keckeisen	A1
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Pfeffer	A4
Judgment Order of the United States Court of Appeals for the Third Circuit of September 14, 1982, *re* Buchanan	A7
Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania Entered January 14, 1982	A10
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing of October 13, 1982 (Pfeffer and Keckeisen)	A34
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing of October 13, 1982 (Buchanan)	A36

TABLE OF AUTHORITIES

Cases:	Page
Abbott v. United States, 239 F. 2d 310 (5th Cir. 1956)	13
American Express Co. v. United States, 212 U. S. 522 (1909)	17
Baltimore & Ohio Chicago Terminal R. Co. v. United States, 583 F. 2d 768 (3d Cir. 1978)	17
Harris v. Rivera, — U. S. —, 70 L. Ed. 2d 530 (1981)	17
McElheny v. United States, 146 F. 2d 932 (9th Cir. 1944)	16
Rivera v. Harris, 643 F. 2d 86 (2d Cir. 1981)	17
Union Pacific R. Co. v. United States, 313 U. S. 450 (1941)	17
United States v. Bohonus, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U. S. 928 (1980)	14
United States v. Braverman, 373 U. S. 405 (1963)	18
United States v. Brodbeck, 430 F. Supp. 1056 (E. D. Wis. 1977)	14
United States v. Brown, 540 F. 2d 364 (8th Cir. 1976)	15
United States v. Bryza, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U. S. 912 (1976)	15
United States v. Bush, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976)	14
United States v. Duz-Mor Diagnostic Laboratory, Inc., 650 F. 2d 223 (9th Cir. 1981)	16
United States v. General Motors Corp., 226 F. 2d 745 (3d Cir. 1955)	17
United States v. George, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973)	15
United States v. Hasenstab, 575 F. 2d 1035 (2d Cir. 1977), *cert. denied*, 439 U. S. 827 (1978)	15
United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974)	15
United States v. Kelly, 507 F. Supp. 495 (E. D. Pa. 1981)	14
United States v. Lea, 618 F. 2d 426 (7th Cir. 1980)	14
United States v. Mandel, 391 F. 2d 1347 (4th Cir. 1979), affirmed in banc by an equally divided court, 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 445 U. S. 961 (1980)	15

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

United States v. Maybury, 274 F. 2d 899 (2d Cir. 1960) . . 16, 17, 18
United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) . . . 12, 15
United States v. Michael Schiavone & Sons, Inc., 430 F. 2d 231 (1st Cir. 1970) 17
United States v. Procter & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942) 13
United States v. Rabbitt, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979) 10, 12, 15
United States v. Reece, 614 F. 2d 1259 (10th Cir. 1980) 14, 15
United States v. Sells, 325 F. 2d 161 (2d Cir. 1963) 16
United States v. Tankel, 331 F. 2d 204 (2d Cir. 1964) 16
United States v. Von Barta, 635 F. 2d 999 (2d Cir. 1980) . . . 12, 14
United States v. West, 549 F. 2d 545 (8th Cir.), *cert. denied*, 430 U. S. 956 (1977) 16
United States v. Wilson, 342 F. 2d 43 (2d Cir. 1965) 16
United States v. Zambardi, 276 F. 2d 169 (2d Cir.), *cert. denied*, 364 U. S. 842 (1960) 16

Rules:

Federal Rule of Criminal Procedure 23(c) 16

Statutes:

18 U. S. C. § 1341 . . . . . 2, 4, 10, 11, 16
28 U. S. C. § 1254(1) 1
49 U. S. C. § 41(1) 17

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, adjudging defendants guilty of mail fraud and conspiracy, is not reported. A copy of the Memorandum is printed in the Appendix at A10.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit, printed in the Appendix, at A34 and A36, were entered on October 13, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 18

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom

it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

49 USCS § 11903

§ 11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] (1) at less than the rate in effect under chapter 107 of this title [49 USCS §§ 10701 et seq.], or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

STATEMENT OF THE CASE

Defendants were charged in a 21 count indictment alleging violations of 18 U. S. C. § 1341 (mail fraud) and 49 U. S. C. § 41 (Elkins Act).

Count 1 of the indictment charges a conspiracy among the defendants to violate the mail fraud and Elkins Act statutes. According to the allegations in Count 1, American Airlines hired trucking companies for the transportation of freight to and from airline terminals. During the time period framed by the indictment, defendants Keckeisen, Pfeffer and Buchanan were American Airlines employees in management positions connected with American's shipment of freight. Pinto Trucking Service, Inc. (hereinafter "PTS") was engaged in the business of freight transportation by truck. According to the indictment at Count 1, PTS was hired by American to transport freight to and from American terminals and the American Airlines defendants, as managers of freight sales and service, received "kickbacks, bribes and gratuities" from PTS to exercise their influence over the acquisition and retention of American's over-the-road freight business by PTS.

Count 1 charges the payment of checks to "J & M Special" or "J. Special" to the benefit of defendant Pfeffer; [1] checks to "E. & G. Company" received by defendant Keckeisen; [2] and checks to Nanette Buchanan received by defendant Buchanan.[3] The receipt of these payments by the American defendants was in violation of American's conflict of interest policy prohibiting the acceptance of anything of value from any entity doing business with

1. Joan Special was the maiden name of defendant Pfeffer's wife.

2. Keckeisen was also charged with having the use of automobiles owned by and registered to PTS.

3. Nanette Buchanan is defendant Buchanan's wife.

American. The overt acts charged in Count 1 correspond to the transmission of checks by mail from PTS to the American employee defendants.

Counts 2 through 13 charge substantive mail fraud violations by the American employee defendants in connection with the payment of money to Keckeisen, Pfeffer and Buchanan, an alleged violation of the American employees' fiduciary responsibilities to provide loyal and faithful services to their employer.

Counts 14 and 21[4] charge violations of the Elkins Act against defendants, specifically alleging that the payments received "knowingly caused to be granted, given, accepted and received a rebate, concession and discrimination in respect to the transportation of property in interstate commerce by [PTS], whereby advantage was given, discrimination practiced; and property transported at a less rate than that named in the applicable tariffs filed by [PTS]".

The case proceeded to trial in the Eastern District of Pennsylvania, without a jury, on September 9, 1981. On January 14, 1982, the court entered a Memorandum and Order finding all of the defendants guilty of conspiracy and mail fraud in Counts 1 through 13, but not guilty of the Elkins Act violations charged in Counts 14 through 21.

The district court concluded that no Elkins Act violation occurred since the Government failed to demonstrate any relationship between the payments made by PTS and any discrimination practiced to the benefit of PTS, a conclusion patently inconsistent with the verdict of guilty on each of Counts 1 through 13, where a conspiracy and mail fraud violations were premised upon the loyal and faithful services deprivation of American by its employees.

Facts stipulated to by the Government compel the conclusion that no fraud occurred, and under the circumstances, none was possible. The American Air Freight

4. All of the defendants were acquitted on all of these charges.

Transportation Service was headquartered in New York City, headed by the Vice President for Freight Marketing. American also maintained local freight departments at the various airport terminals, managed by a local employee known as "Manager of Freight Sales and Services." Ground transportation by truck in the American freight operation from one American facility to another was known as "hub-trucking." Hub-trucking was a profitable concept which produced substantial revenues for American, a concept which employed trucking companies, including PTS, to undertake ground transportation of freight between air terminals. The only official at American authorized to contract on behalf of American was the Vice President for Freight Marketing in New York City. Conversely, none of the local managers, or their employees, including the American employee defendants here, possessed the authority to establish a hub-trucking run or to approve the selection or termination of the trucking companies to be utilized. The local manager's responsibility was limited to recommending truckers to the office of the Vice President for Freight Marketing in New York City, addressing the questions of whether the proposed hub-trucker would charge appropriate rates, whether he was capable of providing the requisite service and whether the schedule proposed by the trucking company met the airline's needs.

Defendants Keckeisen, Pfeffer and Buchanan were never employed by American in the offices of the Vice President for Freight Marketing. Pfeffer was Manager of Freight Sales and Services in Philadelphia from 1966 to 1971, when he was transferred to American's administrative staff in New York City as Director of Freight Forwarding. In this latter capacity, Pfeffer had no authority over hub-truck operations. In 1974, Pfeffer became Manager of Freight Sales and Services for American at the O'Hare

Airport in Chicago. In 1975, the Vice President for Freight Marketing, acting on the recommendation of the local managers of the Chicago and Indianapolis facilities, and in light of the advice of the general staff on review of those recommendations, awarded the hub-truck run between those facilities to Pinto Trucking Service. Defendant Pfeffer, Manager of Freight Sales and Services at the Chicago airport, favored that action. The Manager of Indianapolis concurred. PTS offered superior service at lower costs, including painting its trucks with the American Airlines logo.

George Keckeisen was transferred to Philadelphia in 1971 to become Manager of Freight Sales and Services. In 1976, he was assigned as Manager of Freight Sales and Services at the John F. Kennedy Airport in New York.

In 1977, the Vice President of Freight Marketing, acting on the recommendation of the local managers of the New York and Syracuse facilities, and in light of the advice of the general staff on review of those recommendations, did not award a hub-run between those facilities to PTS. Defendant Keckeisen, Manager of Freight Sales and Services in New York, recommended PTS. After review and analysis by the general staff, the Vice President did not accept this recommendation.

John Buchanan had been Keckeisen's assistant in Philadelphia and when Keckeisen was transferred to New York, Buchanan became Manager, Freight Sales and Services, Philadelphia.

In 1976, the Vice President for Freight Marketing, acting on the recommendation of the local managers, and in light of the advice of the general staff, awarded the hub-runs between Dallas and Fort Worth, Texas, and Oklahoma to PTS. None of the defendants served at the local facilities involved or in the corporate staff who reviewed the recommendations. The only part that any

defendant played in the subsequent decision concerning the awarding of the Dallas-Fort Worth hub-truck runs was that defendant Keckeisen suggested to George A. Shipman, the Vice President of Freight Marketing, that he talk with Mr. Pinto, the President of PTS, as a possible candidate for the hub-truck runs in the southwest area. Thereafter, Mr. Shipman did speak with Mr. Pinto and ultimately recommended him to the Managers in the Texas and Oklahoma cities. Shipman also supported PTS's application for I. C. C. rights for those hub-truck runs.

Until the termination of their employment each of the American Airlines employees received job promotions and favorable job performance ratings from their superiors and co-workers at American. None of the witnesses from American who testified at trial were critical of the job performances of any of the American employee defendants.

It was agreed upon by the Government that between 1966 and 1981, when American and PTS were involved in contracts for hub-trucking services, American was satisfied with the quality of service provided by PTS, and the tariff rates charged by PTS were generally comparable to, or less than, those charged by other trucking companies. The government further agreed that, with respect to the acceptance of money by Keckeisen, Pfeffer and Buchanan, these payments could be accurately characterized as "gratuities." No American employee defendant was ever asked to take any action contrary to the best interest of, or disloyal to, American.

The acceptance of these gratuities was in violation of internal American rules regarding employee behavior, and the American Airlines employees deleted receipt of these payments from conflict of interest statements filed with his employer.

Although American terminated the employment of defendants Buchanan, Keckeisen and Pfeffer in 1978 when it discovered they had been receiving gratuities from PTS, American continued to utilize the services of PTS until 1981.

Finally, as agreed by the government in the stipulation of undisputed facts, the Vice President of American for Freight Marketing, the individual in charge of the hub-trucking business at American, with knowledge of the job performances and capacities of Keckeisen, Pfeffer and Buchanan, stated his belief that if the American employee defendants had received gratuities from PTS, he could not understand what they could have done for PTS in return.

REASONS FOR GRANTING THE WRIT

I. Convictions of Mail Fraud and a Related Conspiracy Cannot Be Sustained on the Basis of Findings Showing Employees Filed False Conflict of Interest Statements Omitting the Receipt of Gratuities From a Vendor Doing Business With Their Employer

The convictions of defendants of mail fraud and a related conspiracy charge are an unprecedented and unwarranted expansion of the scope of this federal offense. The mail fraud statute, 18 U. S. C. § 1341, defines the gist of the offense in these terms: "scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." It is the government's theory that employees of American Airlines devised a scheme or artifice to defraud their employer when they took gratuities from PTS and falsely reported to American Airlines that they had not done so. There were no sustainable findings of fact in the court below that these employees intended to injure their employer in any way or, that their actions had any harmful effect on American Airlines. False statements about gratuities on conflict of interest reports do not make out a federal crime of mail fraud.

In the case that most closely resembles the present case, the Eighth Circuit held that there was no federal crime. *United States v. Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979). The defendant had been a member of the Missouri House of Representatives and eventually became the Speaker of the House. While a member of the House, Rabbitt offered to use his influence to help a firm of architects to get contracts for architectural services on public buildings; in exchange, Rabbitt required a fee of 10 percent from any resulting contracts. Rabbitt carried out his part of the

scheme, and the firm received contracts. Payments of Rabbitt's fee were concealed by paying them through a law firm. There was no evidence of financial loss to the state. The government contended that Rabbitt's conduct was fraudulent because it deprived the citizens of Missouri of their right to his honest and faithful service. The Eighth Circuit rejected this contention:

> Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute. In the instant case, we hold that the evidence does not establish mail fraud within the federal statute.
>
> . . . The evidence clearly shows that Rabbitt acted unethically and violated his canons as a lawyer, a candidate disclosure statute requiring disclosure of fees received during the preceding twelve months, and possibly a Missouri law rendering "partiality" or abuse in public office unlawful. But such violations, although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud under 18 U. S. C. § 1341.
>
> . . . There is no evidence that Rabbitt's use of his friendship, position, and influence to aid [the architects] in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.
>
> We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and

> fairness to the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. . . .
>
> To affirm the convictions on the . . . mail fraud counts would mean expansion of the statute beyond its application in prior political corruption cases. This we refuse to do. (583 F. 2d at 1024-1026) (footnotes omitted).

The Eighth Circuit decision in *Rabbitt* is in accord with its earlier decision in *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976).

The Second Circuit has also rejected the broad argument that would bring employer-employee disputes within the scope of federal mail fraud:

> In the instant case, we are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes, in the context of the employer-employee relationship. The government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of honesty and loyalty he owes his employer. . . . [W]e reject the sweeping theory advanced by the government. . . .

United States v. Von Barta, 635 F. 2d 999, 1001-1002 (2d Cir. 1980) (footnotes omitted).

In the present case, as in *Von Barta*, there were violations of the corporate policy of the employer. The American Airlines employees denied receiving gratuities in violation of a company rule. That did not prevent them from carrying out their official duties to their employer. American Airlines has made no complaint of any actions that these employees took in the performance of their responsibilities. As in *Rabbitt*, these employees did not

have the authority to enter into contracts. PTS was selected by a senior vice president of American Airlines, and the district court found that American was fully satisfied with the price and quality of the trucking services provided by PTS. That view did not change even after American Airlines became aware of the gratuities their employees had accepted.

Mail fraud cases in which convictions of employees have been upheld fall into four categories:

(1) Employees' stealing and exploiting assets that belong to their employers;

(2) Employees' deceiving their employers into entering into contracts with entities secretly owned by those employees;

(3) Purchasing agents' abusing their authority to contract for their principals by demanding kickbacks from firms wishing to do business with those principals.

(4) Elected, high level public officials' violations of public trust.

The prosecution in this case fits into none of these categories.

The leading case involving employee exploitation of employer's assets arose from a scheme by the Procter & Gamble Company to obtain trade secrets and formulas from their competitor, Lever Brothers Company. Procter & Gamble bribed employees of Lever Brothers to obtain experimental cakes of soap, secret processes, and other trade data. *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). In *Abbott v. United States*, 239 F. 2d 310 (5th Cir. 1956), two employees of a petroleum exploration company stole copies of maps con-

taining important geophysical information and sold them to a competing enterprise. The most recent example involved two Sperry Univac employees who sought to exploit, through their own business, computer software that belonged to their employer. *United States v. Kelly*, 507 F. Supp. 495 (E. D. Pa. 1981).

In several cases, employees deceived their employers into entering into contracts with supposedly outside firms, but which were secretly owned by the employee. The press secretary of the mayor of Chicago arranged for the city to award a major advertising contract to a firm that the press officer owned. His mail fraud conviction was upheld. *United States v. Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976). Two other cases involved employees in the private sector. One was the prosecution of officers of a mortgage company who had obtained a substantial loan for a company they controlled without disclosing their other roles. *United States v. Brodbeck*, 430 F. Supp. 1056 (E. D. Wis. 1977). In a recent Second Circuit case, already referred to, a salesman and trader for a securities firm speculated in more than $50 million in government bonds through a corporation that he secretly owned without revealing that he had been trading for his own account. The employee had committed the credit of the securities firm to back his trading, and the firm ultimately bore a major loss when the speculation failed. *United States v. Von Barta, supra.*

There have been a considerable number of mail fraud convictions of purchasing agents who extracted kickbacks from firms who wished to do business with their employers. Using the power to make contracts for their principals, these agents could demand payments from the outside firms. *United States v. Bohonus*, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U. S. 928 (1980); *United States v. Lea*, 618 F. 2d 426 (7th Cir. 1980); *United States*

v. Reece, 614 F. 2d 1259 (10th Cir. 1980); *United States v. Hasenstab*, 575 F. 2d 1035 (2d Cir. 1977), *cert. denied*, 439 U. S. 827 (1978); *United States v. Bryza*, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U. S. 912 (1976); *United States v. George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973). While the purchasing agent cases generally arise from employment in the private sector, one prosecution involved a city building commissioner who extracted kickbacks from firms who wanted to do demolition work for the city. *United States v. Brown*, 540 F. 2d 364 (8th Cir. 1976).

Mail fraud convictions were upheld in two cases where the defendants exercised the extraordinary powers of the office of state governor. One involved the Governor of Maryland. *United States v. Mandel*, 391 F. 2d 1347 (4th Cir. 1979), affirmed in banc by an equally divided court, 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 445 U. S. 961 (1980). The other prosecution was of a close associate of a governor. *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974). These political corruption cases were based upon the defendants' receiving payments for the exercise of the many powers and discretion of a state governor. Prosecutions of lesser government officials, as already indicated, did not withstand appellate review. *United States v. Rabbitt, supra; United States v. McNeive, supra.*

The prosecution in the present case does not fit into any of these four categories. There is no charge here that the employees stole an asset belonging to their employer. The employees did not induce American Airlines to let contracts to a firm that they secretly owned. These employees were not purchasing agents. And, of course, these employees may have violated a corporate policy on gratuities, but they certainly were not involved in high level political corruption.

Defendants should not be convicted of federal mail fraud on the basis of gratuities received from PTS and concealed from their employer. There is not even a civil suit by American Airlines against the employees. No officer or executive of American Airlines found anything to criticize in their work. For violating the company conflict of interest rules, they forfeited their jobs. That is an inadequate basis for bringing the weight of federal criminal law to bear.

Defendants' conviction of mail fraud should be reversed. The related charge of conspiracy to commit mail fraud falls for the same reason.

II. Convictions of Mail Fraud and a Related Conspiracy Are Inconsistent With the Judgment of the Court Below That Defendants Were Not Guilty of Charges Under the Elkins Act and, Therefore, Defendants' Convictions in a Non-Jury Trial Must Be Reversed.

In non-jury criminal trials in the federal system, a trial court is required by Federal Rule of Criminal Procedure 23(c) to make findings of fact. The explicit special findings and the court's conclusions must be consistent. This principle, sometimes described as the *Maybury* rule, has had its most extensive articulation in the rulings of the Court of Appeals for the Second Circuit. *United States v. Maybury*, 274 F. 2d 899 (2d Cir. 1960); *United States v. Zambardi*, 276 F. 2d 169 (2d Cir.), *cert. denied*, 364 U. S. 842 (1960); *United States v. Sells*, 325 F. 2d 161 (2d Cir. 1963); *United States v. Tankel*, 331 F. 2d 204 (2d Cir. 1964); *United States v. Wilson*, 342 F. 2d 43 (2d Cir. 1965). *But see, United States v. West*, 549 F. 2d 545 (8th Cir.), *cert. denied*, 430 U. S. 956 (1977). *Compare United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F. 2d 223 (9th Cir. 1981), with *McElheny v. United States*, 146 F. 2d 932 (9th Cir. 1944).

This Court recently addressed the question in the context of a federal habeas corpus proceeding. The Second Circuit had concluded that the *Maybury* rule governed non-jury trials not only in federal criminal prosecutions, but applied also to bench trials in state criminal courts. *Rivera v. Harris*, 643 F. 2d 86 (2d Cir. 1981). This Court, while holding that the *Maybury* rule does not apply to the states, acknowledged that the familiar principle that inconsistency is not sufficient to set aside a jury verdict does not apply in the different setting of a non-jury trial. *Harris v. Rivera*, — U. S. —, 70 L. Ed. 2d 530 (1981).

The district court here found defendants not guilty of any violation of the Elkins Act. 49 U. S. C. § 41(1), holding:

> The government has failed to develop of record evidence beyond a reasonable doubt that there was a deviation from the tariff rates published and filed by PTS.

The court's determination that defendants are not guilty under the Elkins Act is inconsistent with its conclusion they are guilty under the mail fraud statute as a result of receiving payments that the court characterized as bribes, kickbacks and gratuities.

Courts have given a very broad reading to the Elkins Act. Most of these decisions have involved civil sanctions under the Act. *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941); *American Express Co. v. United States*, 212 U. S. 522 (1909); *United States v. Michael Schiavone & Sons, Inc.*, 430 F. 2d 231 (1st Cir. 1970); *United States v. General Motors Corp.*, 226 F. 2d 745 (3d Cir. 1955). *See also Baltimore & Ohio Chicago Terminal R. Co. v. United States*, 583 F. 2d 768 (3d Cir. 1978). It is evident from these cases that the Act is violated when a carrier

gives value to a shipper in order to win shipping business. That principle was confirmed by this Court in a criminal prosecution under the Elkins Act. *United States v. Braverman*, 373 U. S. 405 (1963). In *Braverman*, moreover, this Court held that payment by a carrier to an employee of the shipper, in that case the transportation manager, would violate the Act.

The district court here concluded that the Government had failed to prove that there was any deviation from the tariff rates filed by PTS. Necessarily, this conclusion rejects any connection between the payments to the American Airlines' employees and the contracts for shipment of goods between American Airlines and PTS. The court's holding of *no nexus* between the payments and the contracts was, no doubt, correct. The court's conclusion of lack of nexus between the payments and the contracts is inconsistent with the keystone findings of fact that undergird the convictions of mail fraud and a related conspiracy.

If defendants accepted bribes, kickbacks and gratuities, and as a result, PTS obtained and retained shipping business, under *United States v. Braverman, supra*, a criminal violation of the Elkins Act would have occurred. The district court concluded, and properly so, that there was no such violation of the Elkins Act. In accordance with the *Maybury* rule, the convictions of defendants for mail fraud and the related conspiracy cannot be affirmed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

Of Counsel:
CURRAN, WINNING
& FIORAVANTI
P. O. Box 30
606 East Baltimore Pike
Media, PA 19063

ROBERT E. J. CURRAN
P. O. Box 30
606 East Baltimore Pike
Media, PA 19063
(215) 565-4322
Counsel of Record for Petitioners